

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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JOE HENRY BANDY III,

Civil No. 06-173 (JRT/SRN)

Plaintiff,

v.

**ORDER ON REPORT AND  
RECOMMENDATION**

ROBERT FENEIS, J. SOUTHWICK,  
DENISE BARRGER, RALPH FLESHER,  
DOUGLAS OLSON, and  
CALVIN STENLUND,

Defendants.

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Joseph Henry Bandy, III, #125257, Minnesota Correctional Facility, 7525  
Fourth Avenue, Lino Lakes, Minnesota 550147, *pro se* plaintiff.

Plaintiff Joe Henry Bandy III commenced this action by filing a complaint seeking relief for alleged violations of his constitutional rights by defendants. In a Report and Recommendation dated August 25, 2006, the Magistrate Judge recommended “dismissing without prejudice” plaintiff’s motion for injunctive relief because defendants had not been served with the Complaint. Because no objections to the Report and Recommendation had been filed by the September 1, 2006 deadline, the Court adopted the Report and Recommendation in an Order dated September 7, 2006.

On September 11, 2006, the Court received plaintiff’s objection to the Report and Recommendation. In his objection, plaintiff explained that he did not receive the Report and Recommendation until after the deadline for filing an objection had passed. The

Court therefore considers plaintiff's objection to be timely, and vacates the Order dated September 7, 2006. However, plaintiff offers no reason why the Report and Recommendation should not be adopted. The Court agrees with the Magistrate Judge that the motion for injunctive relief cannot be granted at this time because plaintiff has not effectuated service upon defendants.<sup>1</sup> Plaintiff may re-file his motion after having effectuated service of process upon defendants.

In his objection, plaintiff explains that he needs more U.S. Marshall forms so that he may effectuate service on additional defendants. The Clerk of Court is directed to mail the forms plaintiff has requested. Because plaintiff did not have all the needed forms, the Court extends the deadline for filing the forms imposed by the Magistrate Judge in an Order dated August 10, 2006. Within 60 days of the date of this Order, plaintiff shall file one completed Form USM-285, and one copy of his amended complaint, for each defendant to be served in this matter. If plaintiff does not satisfy this requirement, the Court will conclude that he has abandoned this action, and the case will be dismissed without prejudice for lack of prosecution. *See* Fed. R. Civ. P. 41(b).

### **ORDER**

Based on the foregoing and all of the records and files herein, **IT IS HEREBY ORDERED** that:

1. The Order dated September 7, 2006 [Docket No. 31] is **VACATED**.

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<sup>1</sup> The Court concludes, however, that the proper resolution of this motion is to deny it, while granting plaintiff permission to re-file the motion, rather than dismissing it without prejudice, as recommended by the Magistrate Judge.

2. Plaintiff's objection to the Report and Recommendation [Docket No. 33] is **OVERRULED**. The Magistrate Judge's Report and Recommendation is **ADOPTED** as to the Report, but **MODIFIED** as to the Recommendation. Accordingly, plaintiff's motion for injunctive relief [Docket No. 6] is **DENIED**. Plaintiff may re-file the motion after having effectuated service of process upon defendants.

3. Within 60 days of the date of this Order, plaintiff shall file one completed Form USM-285, and one copy of his amended complaint [Docket No. 5] for each defendant to be served in this matter. If plaintiff fails to comply with this Order, the Court will dismiss this action pursuant to Federal Rule of Civil Procedure 41(b).

4. The Clerk of Court is respectfully directed to mail to plaintiff a copy of this Order and eight copies of the Form USM-285.

DATED: September 25, 2006  
at Minneapolis, Minnesota.

s/ John R. Tunheim  
JOHN R. TUNHEIM  
United States District Judge